Filed 6/18/19 P. v. Santana

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LISANDRO SANTANA, Defendant and Appellant.	B289251 (Los Angeles County Super. Ct. No. BA460018)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norman J. Shapiro, Judge. Affirmed.

Susan L. Ferguson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

In *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), our Supreme Court held that Proposition 47's petty theft provision, Penal Code section 490.2, covers a theft-based violation of Vehicle Code section 10851, which prohibits taking or driving a vehicle without consent. As a result, to obtain a felony conviction for violating Vehicle Code section 10851 based on theft of the vehicle, the People must prove the value of the stolen vehicle exceeded $950.

Lisandro Santana appeals his felony conviction for violating Vehicle Code section 10851, arguing it must be reduced to a misdemeanor because the People offered no evidence of the value of the stolen vehicle he was caught driving. Although the jury was instructed that Santana could violate Vehicle Code section 10851 by either taking *or* driving a stolen vehicle, the record demonstrates the jury convicted him of the non-theft offense of driving the stolen vehicle. His felony conviction was therefore valid. We affirm.

PROCEDURAL BACKGROUND

Following trial, a jury found Santana guilty of felony driving or taking a vehicle without consent in violation of Vehicle Code section 10851, subdivision (a) and misdemeanor driving with a suspended license in violation of Vehicle Code section 14601.1, subdivision (a). The trial court found two prior serious and/or violent felonies true and struck one of them. (Pen. Code, §§ 1170.12, subd. (b), 667, subds. (b)–(j), 667.5, subd. (c), 1192.7.) The court sentenced Santana to six years for the felony count and six months stayed for the misdemeanor count, with the stay to become permanent after completion of the six-year term.

FACTUAL BACKGROUND

On Saturday, July 9, 2017, J.M. left her 2009 Toyota Scion with a mechanic at his residence for maintenance and transmission work. On Monday, the mechanic notified her that her car had been stolen.

The car was recovered a month later on August 8, 2017, when Santana was stopped while driving it. Police pulled him over after noticing the rear license plate was missing. Santana was the only person in the car. He could not produce a driver's license or ownership documentation, and he told officers he had "just got" the car and was "waiting on" the vehicle registration. A search of the vehicle uncovered a bag containing about 10 or 11 vehicle keys and a variety of tools, including a screwdriver. One of the keys appeared to be shaved. Parts of the vehicle also appeared to be "stripped"—interior panels, a side mirror, and both license plates were missing, and the tires were very loose.

During a police interview, Santana said he gave his friend Adam some money for the car. He did not think the car looked "stripped," and it was in the same condition as when he received it.

DISCUSSION

Santana contends his felony conviction for violating Vehicle Code section 10851, must be reduced to a misdemeanor because the People offered no evidence of the value of the stolen vehicle he was caught driving. We are not persuaded.

Vehicle Code section 10851, subdivision (a) provides that "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with the intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or

without intent to steal the vehicle . . . is guilty of a public offense" punishable as either a felony or misdemeanor.

This provision "defines the crime of unlawful driving *or* taking of a vehicle. Unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and the taking may be accomplished by driving the vehicle away. For this reason, a defendant convicted under [Vehicle Code] section 10851(a) of unlawfully *taking* a vehicle with the intent to permanently deprive the owner of possession has suffered a theft conviction . . . . On the other hand, unlawful *driving* of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete . . . . Therefore, a conviction under section 10851(a) for posttheft driving is not a theft conviction . . . ." (*People v. Garza* (2005) 35 Cal.4th 866, 871 (*Garza*); see *People v. Gutierrez* (2018) 20 Cal.App.5th 847, 854 (*Gutierrez*) ["Taking a vehicle with the intent to permanently deprive the owner of possession is a form of theft, and a defendant convicted of violating section 10851 with such an intent has suffered a theft conviction. [Citation.] On the other hand, posttheft driving and joyriding are not forms of theft; and a conviction on one of these bases is not a theft conviction."].)

Page examined how Proposition 47, enacted by voters in 2014, applied to this offense. The court explained that Proposition 47 "reduced the punishment for certain theft- and drug-related offenses, making them punishable as misdemeanors rather than felonies. To that end, Proposition 47 amended or added several statutory provisions, including new Penal Code section 490.2, which provides that 'obtaining any property by theft' is petty theft and is to be punished as a misdemeanor if the

value of the property taken is $950 or less." (*Page, supra,* 3 Cal.5th at p. 1179.)

Page concluded Proposition 47's new theft provisions applied to felony violations of Vehicle Code section 10851 based on theft of the vehicle. "By its terms, Proposition 47's new petty theft provision, [Penal Code] section 490.2, covers the theft form of the Vehicle Code section 10851 offense. As noted, [Penal Code] section 490.2, subdivision (a) mandates misdemeanor punishment for a defendant who 'obtain[ed] any property by theft' where the property is worth no more than $950. An automobile is personal property. 'As a result, after the passage of Proposition 47, an offender who obtains a car valued at less than $950 *by theft* must be charged with petty theft and may not be charged as a felon under any other criminal provision.' " (*Page, supra*, 3 Cal.5th at p. 1183.)

Page involved resentencing pursuant to Proposition 47's petitioning procedures by which defendants already convicted of qualifying felonies may petition to have their felonies reduced or redesignated as misdemeanors. (Pen. Code, § 1170.18, subds. (a), (f); *Page, supra,* 3 Cal.5th at pp. 1179–1180.) Santana committed his offense and was convicted after Proposition 47 was in effect, so to be convicted of a theft-based felony violation of Vehicle Code section 10851, the People were required to prove that the value of the vehicle exceeded $950. (*Gutierrez, supra,* 20 Cal.App.5th at p. 855 [for post-Proposition 47 arrest for vehicle theft, "the People were required to prove as an element of the crime that the rental car he took was worth more than $950"].)

The jury in this case was instructed that it may find Santana guilty of violating Vehicle Code section 10851 if he "took *or* drove a vehicle belonging to another person" without consent.

(Italics added.) The People did not offer evidence of the value of the vehicle to support the theft-based taking theory, and the jury was not instructed to determine whether the value of the vehicle exceeded $950. Thus, the instructions allowed the jury to convict Santana on both legally correct and legally incorrect theories. (See *Gutierrez, supra,* 20 Cal.App.5th at p. 857 ["The court's instructions here allowed the jury to convict Gutierrez of a felony violation of [Vehicle Code] section 10851 for stealing the rental car, even though no value was proved—a legally incorrect theory—or for a nontheft taking or driving offense—a legally correct one."]; see *People v. Jackson* (2018) 26 Cal.App.5th 371, 378 (*Jackson*) [same].)

Reduction or reversal of Santana's felony conviction is not warranted, however. "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*People v. Chiu* (2014) 59 Cal.4th 155, 167; see *Gutierrez, supra,* at p. 857.) " 'An instruction on an invalid theory may be found harmless when "other aspects of the verdict or the evidence leave no reasonable doubt that the jury made the findings necessary" under a legally valid theory.' " (*Gutierrez,* at p. 857.)

The record conclusively demonstrates that the jury rested its verdict on non-theft driving without consent. The evidence showed without contradiction that Santana was pulled over while driving the car that had been stolen a month earlier. Other than weak inferences from the keys and tools found with Santana, there was no evidence as to the identity of the person who actually stole the car. Thus, the evidence overwhelmingly supported a conviction for posttheft driving without consent.

Any doubt as to the basis for Santana's conviction was eliminated during closing arguments when the prosecutor elected to pursue only the posttheft driving theory, which was reinforced by defense counsel. In discussing the taking or driving element of Vehicle Code section 10851, the prosecutor told the jury, "I don't have to prove that he both took and drove. I have to prove either he took or drove." The prosecutor showed a dash-cam video of Santana being pulled over and argued, "[C]learly he is the driver of the vehicle from that video. So, I don't think there is any dispute about that. [¶] First element is satisfied." In arguing Santana intended to deprive the owner of possession, the prosecutor said, "But I think it is clear that the defendant was not tricked into doing this. He didn't accidentally drive the victim's vehicle. He did it with the intent to deprive the owner of the vehicle."

The prosecutor then specifically told the jury: "I do not have to prove, okay, who initially stole the car on July 9th, 2017. [¶] There is strong evidence to suggest the defendant might have been the one that did that—he lives nearby, he has tools to steal cars, and he is found driving the stolen car. [¶] There is plenty enough stuff pointing to him. [¶] However, there is no requirement I need to prove that to you, whoever took that car on July 9th, it could have been somebody else. [¶] If you think it was somebody else and you think that is reasonable, they could have given it to the defendant afterwards, he will still be guilty of the crime. [¶] The question is not who took the car on July 9th. [¶] The question was when he was driving the vehicle in August a month later, did he have the intent to deprive the owner of that vehicle. [¶] Remember, this is not grand-theft auto, this is not carjacking, it's a specific charge, so don't get hung up on that. [¶]

Would it be nice to know, would it be nice to have camera footage on July 9th? Definitely, it would be nice to know that, but we can't know everything in life. [¶] All you need to focus on is the elements of this crime."

Defense counsel in closing made even clearer that the offense was based on posttheft driving without consent. She focused Santana's defense on the lack of specific intent, which she argued was the "major issue here. That is what the People are arguing to you that when my client was driving that car he intended to deprive the rightful owner of his rights to the vehicle." Defense counsel specifically told the jury, "As the prosecutor told you he does not have to prove that my client is the one that took the car; that is absolutely correct. *That is not the charge here.*" (Italics added.)

In rebuttal, the prosecutor put the matter to rest by arguing: "I think defense counsel pointed out we don't know what happened on July 9th, that is true. [¶] But again you may have lots of reasonable versions of what happened on July 9th. That is okay. *We are not here to try what happened on July 9th.*" (Italics added.)

Even if the jury believed Santana initially stole the car, it still would have convicted him of posttheft driving. Given the month between the theft and Santana's arrest while driving the car, no reasonable juror could have concluded that Santana initially stole the car but then did *not* drive the car after a substantial break in time once the theft was complete. (*Page, supra,* 3 Cal.5th at p. 1188 ["Where the evidence shows a 'substantial break' between the taking and the driving, posttheft driving may give rise to a conviction under Vehicle Code section 10851 distinct from any liability for vehicle theft."]; *Garza, supra,*

35 Cal.4th at p. 871 ["[U]nlawful *driving* of a vehicle is not a form of theft when the driving occurs or continues after the theft is complete . . . . Therefore, a conviction under section 10851(a) for posttheft driving is not a theft conviction."].) In other words, "[i]n light of this overwhelming evidence of defendant's posttheft *driving*, even if every juror believed that defendant both took the car *and* drove it after the theft was complete, no reasonable juror could have found that he took the car *but did not drive it* after the theft was complete. [Citation.] Thus, the jury necessarily found that defendant drove the car in an act that was distinct from and independent of the taking of the car. This act constituted a separate offense for which defendant could be separately convicted. [Citation.] Even if there had been substantial evidence that defendant took the car, such that the 'evidence was consistent either with driving, or with taking and driving,' 'no reasonable juror could have found taking alone.' " (*People v. Calistro* (2017) 12 Cal.App.5th 387, 403.)[1]

Our conclusion is consistent with the California Supreme Court's recent decision in *People v. Lara* (2019) 6 Cal.5th 1128 (*Lara*). In *Lara*, the defendant had been apprehended driving a stolen car six or seven days after it had been stolen. No evidence directly implicated the defendant in the initial theft, although the car showed obvious signs of theft, the ignition had been tampered with, and two keys found on the floorboard could have been used in the ignition. (*Id.* at p. 1131.) The defendant was charged with violating Vehicle Code section 10851, but the jury instructions

---

[1] Santana argues in his reply brief that "not all post-theft *driving* offenses are, by definition, non-theft offenses." Whether true generally, his driving of the car in this case without consent *a month after* it was stolen qualifies as a non-theft offense.

and prosecution's arguments limited the theory to unlawful driving. (*Lara,* at p. 1131.)

After concluding the defendant was eligible for sentencing pursuant to Proposition 47, the court held the defendant was properly convicted of felony unlawful driving under section 10851 absent evidence of the vehicle's value because "[t]he evidence showed that defendant was apprehended driving the stolen car six or seven days after it was taken from its owner. Whether or not he was involved in the theft—a point the prosecutor conceded was not proved at trial—the evidence clearly establishes a substantial break between the theft and defendant's act of unlawful driving." (*Lara, supra,* 6 Cal.5th at p. 1137.)

The court also rejected the defendant's claim the jury instructions erroneously failed to distinguish between theft and nontheft forms of the Vehicle Code section 10851 offense and did not require the jury to find the vehicle's value exceeded $950, given the instructions and arguments limited the theory to nontheft unlawful driving. (*Lara, supra,* 6 Cal.5th at p. 1137.) The instructions were incomplete in that they did not expressly refer to *posttheft* driving, but the court found the omission harmless beyond a reasonable doubt because the six or seven days between the theft and the posttheft driving "indisputably qualifies as a ' "substantial break" ' between the theft and the driving." (*Id.* at p. 1138.) There was also no evidence linking the defendant to the initial theft, and the prosecutor expressly conceded the evidence was insufficient to convict the defendant of theft. (*Ibid.*)

Santana's case here is different from *Lara* in that the jury was incorrectly instructed on both valid and invalid theories under Vehicle Code section 10851. But *Lara*'s reasoning supports

our conclusion there was no reasonable doubt the jury convicted Santana on a valid posttheft driving theory. As in *Lara,* the record here lacked direct evidence showing Santana initially stole the car, and the tools and keys found in the car only created a weak inference he stole it. However, there was unrefuted and overwhelming evidence he was driving the car a month after the theft, which was three weeks *longer* than the break in time in *Lara*, supporting a separate posttheft driving offense. (*Lara, supra*, 6 Cal.5th at p. 1138.) Finally, as in *Lara*, the prosecutor expressly elected the theory of posttheft driving in closing arguments.

Santana relies heavily on *Jackson*, but it is distinguishable. The court reversed a Vehicle Code section 10851 conviction based on the same instructional error of omitting the value requirement for a theft-based conviction, but the prosecutor's argument did not clearly elect the posttheft driving theory, unlike the prosecutor's arguments here. (*Jackson, supra,* 26 Cal.App.5th at pp. 379–380.) Also unlike in Santana's case, substantial evidence in *Jackson* supported a theft conviction, based on the defendant's possession of the stolen vehicle under suspicious circumstances shortly after it was stolen. Since no one saw the defendant actually drive the vehicle and he was not driving it when arrested, a juror might have found theft without also finding posttheft driving. (*Id.* at pp. 380–381.) Here, again, the evidence of theft was exceedingly weak and the evidence of posttheft driving was overwhelming, so no reasonable jury would have convicted him of theft but not posttheft driving. Because the record conclusively demonstrates the jury rested its verdict on the legally correct non-theft theory of driving the stolen vehicle

without consent in violation of Vehicle Code section 10851, reversal of Santana's conviction is unwarranted.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

GRIMES, J.

WILEY, J.